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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CATHERINE WAY et al., Plaintiffs and Respondents, v. ANNE WOLFF, Defendant and Appellant.	A125581 (Marin County Super. Ct. No. CV064953)

This case arises from a dispute between neighbors in Larkspur's Palm Hill neighborhood concerning a stand of 45 blue gum eucalyptus trees located on appellant Anne Wolff's property. The stand is adjacent to respondents' properties. The trial court determined that the trees constituted a nuisance and entered a permanent injunction requiring Wolff to abate the nuisance caused by her trees. Wolff challenges the sufficiency of evidence to support this conclusion and the remedy of a permanent injunction calling for the removal of more than half of the trees. She also claims the court issued erroneous evidentiary rulings to her prejudice. We affirm.

I. FACTS

A. *The Trees, Properties and Parties*

The stand of blue gum eucalyptus at issue in this litigation is the remnant of a much larger grove planted in the Palm Hill area of Larkspur in the late 19th century. This species is among the fastest growing trees on earth. It resprouts prolifically from dormant buds when damaged by fire or aggressively trimmed, limbed or topped. It is the second most failure-prone species in Northern California, suffering more windthrown and

limb breakage occurrences than any species except the Monterey pine. Further, the blue gum eucalyptus has an extremely heavy wood and tends to develop over-extended limbs. The roots are shallow and thus anchorage is poor. The trees form upright branches with weak attachments and crotches weakened by included bark that can wedge the crotch apart. Fire hazard studies reveal that this species produces more dead and down material than any other species in the state.

Pursuant to the Larkspur Municipal Code, Palm Hill is located within a "High Hazard Fire Zone." (Larkspur Mun. Code, § 14.10.010.) The code defines a "High Hazard Fire Zone" as "[w]ildland areas of the community that are intermixed with or adjacent to habitable structures and where the threat of a wildland fire could potentially cause widespread damage, threaten lives and impact local fire protection resources . . . ." (*Ibid*.) The blue gum eucalyptus is considered a "pyrophytic" tree. Pyrophytic trees cannot be planted in a high-fire hazard zone. (*Id.*, §§ 12.16.050, subds. J, K.) The planting, growing and existence of any gum tree within 40 feet of a public sewer is illegal and deemed a public nuisance. (*Id*., § 12.08.010.)

Respondents Joni and Michael Mindel (Mindels) and Lawrence and Catherine Way (Ways) own single family residences on lots adjoining Wolff's property in the Palm Hill area. Historically, each lot was part of a larger estate owned by Lottie McWatters. McWatters began subdividing and selling off lots in the 1990's. Wolff and her late husband purchased their property at 64 Bayview in 1994, designing and building their own home which they occupied in October 1996. Because they were attracted to the forested area and privacy screen provided by the trees, Wolff and her late husband saved as many trees as possible during construction. Wolff loves her trees.

The Mindels purchased their newly built home at 60 Bayview in 1995, moving in the following January. In 2005, the Ways bought a new home at 111 Elm and moved in that March.

B. *Impact of the Trees*

The Weiss Company, Incorporated (Weiss Co.) developed the Mindel and Way lots, purchasing the raw land from McWatters's subdivision in approximately 1994.

McWatters's home was still standing and in use, and in 1995 she applied for and received permission to remove nine eucalyptus trees from her own property on 109 Elm Avenue because they were "a fire and safety hazard." At that time what would be the Wolff, Mindel and Way properties were in their "natural state," with many eucalyptus and oak trees and other vegetation. The eucalyptus stand was "just growing wild." It looked like it had never been tended. Indeed, Wolff testified that the trees had been neglected by the prior owner.

1. Mindel Property. Weiss Co. removed most of the trees from the Mindel lot, leaving a few near the street. However, Wolff's eucalyptus grove, which Dan Weiss (Weiss), president of Weiss Co., described as "very dense," bordered the Mindel property and significant branches overhung onto the lot. On a number of occasions during construction of the Mindel residence, limbs from Wolff's eucalyptus trees fell onto the Mindel property. In one instance a branch put a sizable hole in the newly constructed roof, necessitating repair. Weiss testified the company was constantly having to clean up debris shed by the trees and ultimately hired an arborist to cut every overhanging limb.

After the Mindels moved in, they experienced various problems. There was the constant noise from the trees when it was windy, which they described as like a jet plane landing or a freight train. The noise from the wind blowing through the trees and the pelting of debris on the house made it difficult for the Mindels and their children to sleep. As well, there was the mess created by the rain of falling bark, branches, leaves and seed pods, necessitating constant cleanup and maintenance work. The debris clogged the gutters and damaged the roof, killed plants, stained the hardscape and rendered the yard difficult to use at times. They have had to powerwash and bleach the hardscape to remove frequent staining. Leaves sticking to the house created mold on the siding of the house.

Moreover, a number of "gigantic branches and limbs" have fallen onto the Mindel property, including one that landed in the children's play area and damaged the gate. Michael Mindel testified that had the branch fallen on their child, it would have killed him. In January 1997, a 50-foot tree targeting the Mindel property uprooted and was

propped up by another tree in the grove. As well, the Mindels learned that in 1995 or 1996, two trees had uprooted and fallen on another neighbor's property. Raymond Lynch, the neighbor, stated that the large eucalyptus trees landed within a few feet of their house and damaged the fence. At the time of trial, the Mindels continued to "get just as much debris and branches and problems" notwithstanding that Wolff commissioned some trimming after the lawsuit was filed. Two branches were introduced at trial as examples. One large branch fell on the stairway leading to the Mindel residence, another on the driveway about two feet from their vehicles. Photographs were introduced showing considerable debris from the eucalyptus trees on the driveway, yard and patio, as well as branches and a "very large" limb that landed in their yard. One picture showed holes in a screen from branches hitting the window.

2. Way Property. As a condition of approving the design and location of the Ways' home on 111 Elm in 2003 or 2004, Weiss Co. was required to remove all the eucalyptus trees on that parcel. Weiss testified that the City of Larkspur had adopted a policy of requiring builders to remove, at their expense, certain non-native trees such as the blue gum eucalyptus that were considered hazards to the surrounding neighbors, the property and the community.

By that time the Wolff eucalyptus grove was "far larger and far denser," with more overhanging limbs, and brush, leaves and debris piled on the ground. Pods, branches, bark and leaves began falling on the construction site. This caused problems with pouring concrete, such that the footings had to be cleaned repeatedly and the construction schedule changed. On several occasions Weiss told the crew to stop working because it was too dangerous. He was concerned the workers would get hit on the head by a falling limb.

Weiss's father complained to Wolff. Following a face-to-face meeting, he enumerated his concerns in writing, iterating his belief that trimming the branches was her responsibility. The letter included a bid from an arborist to do the work. Wolff became noncommunicative. Weiss Co. ended up paying the arborist to cut every limb overhanging the construction site. Wolff sued for damage to her trees.

Catherine Way related that the trees drop lots of debris, throw branches onto the house and lawn, and pierce the lawn. The seed pods fill the gutters. There were sleepless nights " 'listening to the wind blow the menacing eucalyptus grove outside our window.' " Keeping the yard clean was a constant struggle. Their hardscape was stained, the gutters damaged. The family talked about leaving and discussed going to a safe area in the basement where they could assemble during a storm. The family worried about fire hazard and the possibility that a "super big" branch would hit the side of the house. During windy days the Ways prohibit their children from playing in the backyard for fear of a falling limb or tree.

C. *Prelitigation Interactions and Efforts of the Parties; Professional Assistance and Reports*

1. Mindels' Efforts; Ray Moritz's 1997 Report. The Mindels attempted to work with Wolff to address their numerous concerns about the eucalyptus grove even *before* she and her late husband moved into their Larkspur home in October 1996, communicating by phone calls and letters, to no response or avail.[1] Wolff's daughter did take care of removing the tree that uprooted in 1997 and was propped up by another tree, although the chopped-up branches were left on the Mindels' property.

In 1997 the Mindels hired Ray Moritz, a consulting arborist, to conduct a safety and fire hazard assessment of Wolff's eucalyptus stand as well as their own trees. Moritz concluded that Wolff's trees were "over-mature and in decline" and exhibited "numerous hazardous traits including: poor anchorage, root cutting, girdle roots, root ball isolation . . . , crowded spacing, unstable height growth, poor and hazardous form, crossing trunks and branches, deadwood, over-extended branches, butt scaring and rot, longitudinal cracking, one entirely dead tree and hazardous wind exposure." Some of the trees had hazardous leans toward the Mindels. Topping and severe heading of major limbs created other serious threats. Moritz recommended removing all 21 trees subject to the assessment, as soon as possible. The next year Joni Mindel asked him to reinspect nine

[1] Wolff and her late husband lived in Napa until October 1996 when their Larkspur home was finished.

of the trees closest to the fence line that targeted her home with either a lean or potential branch failure; he was still of the opinion that they should be removed.

The Mindels shared Moritz's 1997 report with Wolff and, through the attorney they hired at that time, offered to mediate all concerns. Wolff claimed harassment. A second offer to mediate prompted a threat of legal action should their "intrusive and hostile" efforts persist.

2. Wolff Uses Marin County Arborists. In 1996, James Lascot, at the time a certified arborist with Marin County Arborists (MCA or company), assessed Wolff's grove and offered a proposal for hazard pruning, which he completed. As part of the initial conversation, he informed her that eucalyptus groves were high maintenance and thus he would recommend thinning out and maybe keeping a few. Wolff wanted to keep them all, and Lascot indicated he felt she could if she were willing to "deal with the maintenance." Lascot conducted a visual inspection of the trees in 1998, finding them in "good health and condition." He recommended removal of large dead overhanging limbs and fire clearance to minimize hazards to the neighboring property.

Attorney Barri Bonapart,[2] who performed services for MCA, asked Lascot about Wolff's trees. He disclosed to her information about the hazards of the trees and his recommendation for removal of many because of their hazard. Upon learning about this interaction, Wolff became very upset and complained to the company about the contact. Lascot sent her a letter of explanation.

Then in 1999, Kenneth Bovero, president of the company, visited the Wolff property at her request to "do some pruning back" of branches hanging over her roof. At that time Bovero expressed the far greater concern that the entire grove needed "severe work" and some of the trees needed to be removed.

In 2001, Louie Brunn, a certified arborist with the company, prepared a report for Wolff, complete with detailed pruning recommendations. The report concluded that because of the proximity of the trees to three houses, their size (many over 100 feet tall)

[2] Bonapart is also respondents' attorney.

and lack of protection from neighboring trees, "all of these trees must be considered hazardous. Each is capable of inflicting serious personal injury, death, and significant property damage. Pruning these trees will reduce the likelihood of tree or branch failure but will not eliminate this possibility." Bovero agreed with this assessment.

3. The Mindels Also Use MCA; Proposal to Remove Trees. In 2002, the Mindels also contacted Bovero of MCA to prune a large eucalyptus tree that was encroaching over their rear patio. This was the one tree which Wolff authorized for safety trimming. There was an initial meeting at the site to evaluate the scope of work; Wolff attended with Peter Brooks, a local arborist. They agreed to some pruning back to reduce the likelihood of tree failure to the Mindels' property. When Bovero set up the crew to do the work, he expressed his professional opinion to Joni Mindel that there were "many hazards associated with the trees" and he was concerned for "the wellbeing of her family." He recommended that the best course of action would be to remove the trees and replace them with a more suitable species not so prone to failure. When the blue gum eucalyptus fails, he told her, "they cut homes in half and smash them."

Bovero quoted a removal price of between $40,000 and $50,000, explaining that tree maintenance was not an option due to the size of the trees and the targets around them. Pruning would buy time, but with such a tightly compacted grove in a residential community, it would be a "maintenance nightmare" and would not eliminate the fire hazard. Further, the trees had not been properly pruned in the past, resulting in a new hazard created by the weakly attached epicormic sprout growth. When the wind flow hits these sprouts, they "come down like massive spears."

The Mindels offered to pay for the cost of removal plus $10,000 for relandscaping Wolff's property. Wolff rejected the offer, threatened to sue Bovero and demanded a letter of retraction. Bovero responded with a letter. He testified that he and others in the company had made recommendations, but had "gotten nowhere. My recommendations had fallen on deaf ears, and the threat of lawsuit is—which is why I created this letter. It just felt very uncomfortable to me, and the liability of putting myself in the situation of being associated with this stand of trees." Specifically, he was concerned about the risk

to the Mindels' property and to his company. Wolff demonstrated a lack of willingness to do anything recommended by the certified arborists in his company.

4. Peter Brooks Works on Wolff's Trees. Wolff retained the services of Peter Brooks to do maintenance work on her trees. He developed a maintenance protocol and worked on her trees for six or seven years, the last time in 2006. In addition to the initial pruning, Brooks stated he believed he did one repeat pruning in the time he worked for her.

Brooks admitted that while he worked for Wolff, his contractor's license was suspended, he carried no insurance of any kind, and had allowed his arborist certification to lapse because of the cost of the continuing education requirements. Wolff never asked him if he were certified or had insurance.

Brooks discussed removal versus maintenance of the grove near the Mindel property with Wolff, but she was not open to the idea; she loved her trees. Brooks told Wolff he believed the trees near respondents' properties could be safely maintained. He believed the internal structure of the trees was intact. On the other hand the cost of maintenance might exceed the value of the trees.

Brooks also indicated that he felt Wolff's desire not to be pushed around by her neighbors played a part in her thinking. She did not want him speaking to the neighbors or even speaking in a voice that could possibly be overheard.

Additionally, Brooks explained that there were some types of hazard assessments he would not feel comfortable performing, and would bring in an expert consultant. These included circumstances where the target of a falling tree was "very highly rated," such as a house or children; where there was below the ground decay or soil failure; and when certain special tools would be used. Further, he was not prepared to do large scale tree removal because he did not have a crane.

Wolff discussed with Brooks the recommendations and estimate provided by Louie Brunn of MCA, indicating she could not afford to have all the work done. She instructed Brooks to do what he could in one day, for which he would charge $1,200. He

told her one day's work would not be sufficient to do all the necessary safety pruning, but she did not expand the scope of work.

On one visit Wolff told Brooks about the Mindels' offer to pay to remove trees adjacent to their property; Brooks said she should consider the offer. He noted that the trees had already been severely topped and there was a concern about resprouting and rot in the topping cuts; these were reasons supporting removal.

As well, Brooks expressed his concern that without ongoing annual monitoring and maintenance, Wolff would end up with a hazardous situation. It was obvious to Brooks that removal was not on the table. But regular maintenance would require pruning every one to two years. He felt he was "always performing a form of triage" as a result of budget limitations. He also told Wolff that the litter, debris and sap coming from the trees were a nuisance to the neighboring properties, and the heavy load of debris from the trees raised fire hazard concerns.

5. Moritz 2004 Report. Moritz reinspected the grove in 2004 to assess eight trees targeting the Mindel property for "safety mitigative pruning." He recommended removing two of them, safety pruning or removal of another, and safety pruning and monitoring for the rest.[3] Moritz concluded that while many of the potential hazards targeting the Mindels' property had been mitigated, the identified hazards needed attention, ongoing maintenance and monitoring. These hazards included "overextended limbs and multiple leaders which could break off and, at minimum, cause property damage and at the most threaten health and safety of the Mindel family."

6. Fire Department Notice and Compliance. In 2006, respondents and others requested that the fire department conduct a formal fire hazard inspection of Wolff's property. The fire chief indicated it was past the fire season and he was not authorized to do anything. The next year the department issued a vegetation fire hazard notice requiring Wolff to rake and remove dead materials and fallen limbs in the eucalyptus

[3] Wolff asked Lascot to comment on Moritz's 2004 report. He did, expressing that he did not feel any of the trees required removal.

grove. Wolff received a record of completion noting the requested work had been completed and nothing more was required at the time.

7. Dan McKenna 2006 Report. Respondents hired consulting arborist Dan McKenna in 2006. Formerly he was the arborist for San Francisco. McKenna was only able to conduct a visual evaluation from adjoining properties. He observed that respondents' properties "are within a potential target zone in which part or all of the subject trees could land if they were to have a structural failure." He reported that all of the subject trees had, or in the near future would have, lateral branching overhanging the adjoining properties and the trees would be expected to grow between four and six feet annually. Several had been topped, rendering them more likely to be or become unsafe. One presented a likelihood of stem failure; another demonstrated poor tree vigor. Charts detailed the condition and failure potential of each tree. To minimize tree and/or limb failure, McKenna recommended a "comprehensive maintenance and tree removal plan that includes removing 7 trees, in conjunction with a pruning regime for the remaining trees . . . ."

D. *Postlitigation Work and Reports*

1. Moritz Expert Opinion and 2008 Report. Moritz was respondents' expert at trial. In addition to being a consulting arborist, he is a certified urban forester with subspecialties in forest pathology, soils and fire prevention. Moritz has spoken, taught, consulted and published extensively in his areas of expertise.

Moritz explained that the stand of blue gum eucalyptus posed fire hazards as well as structural failure hazards. Describing the stand as a whole, he pointed out that it is a remnant stand, reduced from a much larger grove that had been growing there for 100 or so years. This is significant because of the "edge effect": The edge of trees remaining after a clear cut can start to fall because they are subject to previously unencountered forces. Further, the stand replacement intensity for the eucalyptus in its natural environment occurs approximately every 30 years. Thus, the Wolff stand is overmature. Overmature trees bring problems of summer branch drop and tree failure. As well, the trees become more flammable as they grow older. Once the blue gum eucalyptus reaches

60 to 80 years, it assumes a wide spreading canopy with heavy limbs, and "you start running into those failures." The stand itself is very dense, with many enormous, massive trees that weigh tons.

The blue gum eucalyptus produces more debris per year than any other species in California. The debris typically falls in September and October during the height of the fire season. The species has an abundance of highly volatile oils and can drop to a very low moisture content. It also has a great ability to sprout growth when cut or heavily trimmed. The increased foliage increases the fuel ladder up the tree. As well, the species rebuilds fuel very quickly. As the trees mature, more internal twigs and leaves die and the trees start building up dead wood more rapidly because of the rapid growth rate.

This species tends to "self ladder," meaning it creates its own fuel ladder, beginning with ground debris and brush. The fire runs up the loose bark, which has a very high oil content, and ignites the canopies. The Wolff trees have overlapping canopies. Once a fire reaches a canopy it can easily move from tree to tree. Moritz recommended removing a lot of the big trees, which would space out the stand significantly.

Moritz also delved into grading impacts that occurred during construction of the Wolff residence, resulting in scraping of the surface roots; once wounded, decay starts developing. Other construction activity compacted the soil. Soil compaction prevents aeration and traps toxic gasses, conditions which encourage root decay. As well, the soil is shallow colluviums on a shattered bedrock. Such soils do not have good structure or porosity and have poor stability. The shallowness of these soils affects the depth of the roots.

Because the stand is dense, roots girdle each other as they continue to grow. Girdle roots decrease root growth and thus damage the root system; as the girdle becomes more embedded, decay develops behind it. Moritz observed girdle roots and resulting decay. He also observed a variety of trunk defects greatly increasing the probability of failure and decay; branch defects rendering branches more likely to fracture and fail;

internal decay on some of the trees; and poorly attached sprout growth which increases the regular falling of small branches.

Moritz's February 2008 tree tally and assessment designated 28 of 45 trees for removal, while recommending maintenance for the rest. Three of the trees marked for removal were within 40 feet of a sewer and thus in violation of the Larkspur Municipal Code. Moritz explained that his assessment of the hazard posed by a particular tree was based on the value of the target within the potential failure zone of the tree and the nature of the defect presented by the particular tree, as well as exposure to wind, prior whole tree failures, growth rate and other characteristics of the species, and size and maturity of the trees and grove. The target value of a home, for example, is very high not only because of the house but the frequency of use whereby people are put at risk.

The assessment described each tree designated for removal and detailed a variety of defects and problems: major structural defects; major root disturbance; major impacts by utilities, driveways and road; girdle root; rubbing damage; nonstandard pruning; long overhanging scaffold branches; tree lopsided with heavy scaffold branches; butt rot and decay; heavy end weight; twin boles with significant potential for failure; major dominant tree with excessive ladder fuel trunk; abnormal base; adventitious growth or multiple sprouts that will be poorly attached and prone to failure; massive super dominant tree with massive over-extended limbs and excessive top weight; excessive sprout growth; poor attachment; poor form for future stability; ladder fuel; suppressed canopy; branch failures; poor scaffold development; major dominant tree experiencing severe root competition and potential defects; and crook sweep.

At trial Moritz opined that there was "nothing short of removal that's going to abate the problem. And the type of work that was done, while lopping off the top of a tree might reduce the potential for whole tree failure temporarily, it . . . automatically increases the potential for branch failure and it increases the fire hazard."

2. Kenneth Allen 2008 Report. Kenneth Allen testified as an expert for Wolff. He performed structural evaluations for Wolff in 2007 and 2008, formulated pruning specifications and responded to Moritz's October 2008 tally and assessment. Allen

identified one tree as unsafe—apparently it was slated for removal in November 2008—and concluded no other trees need be removed, although two trees showed indications of possible structural defects. His report included recommendations for further inspection and pruning. In the meantime, pruning work was conducted pursuant to Allen's recommendations. Allen professed at trial that all the trees which Moritz recommended for removal in his tree tally were structurally sound in terms of hazard to the neighbors' property.

Allen is not a fire ecologist, and holds himself out on his Web site as a palm tree specialist. He did not take fire hazards into consideration because Wolff did not ask him to opine on that issue. Moritz did not believe Allen had the background to look at soils or assess fire issues.

3. Fire Chief Testimony. The fire chief testified that the department "wants to support a property owner who willingly wants to remove a tree that's considered a fire hazard, or a [pyrophytic] tree in a hillside area." Thus the code allows for expediting the permitting process for this purpose.

E. *Litigation*

Respondents filed their complaint in November 2006, alleging causes of action for private nuisance and seeking declaratory relief and injunctive relief as well as damages. Thereafter they dismissed the damages claims. During the course of trial the court visited the site, accompanied by the parties' attorneys.

The trial court concluded that the grove in its present state constituted a nuisance and that substantial evidence refuted Allen's conclusion that the trees need not be removed. The court specifically noted from its own observations during the site visit that "defendant's trees present a substantial and real hazard to both the Mindel and Way homes." Additionally, the court stated it viewed a 185-foot-tall tree (per Moritz's testimony) leaning toward the Way home, and referenced the numerous photographs introduced at trial showing branches, leaves and other debris which rained on respondents' properties over the years. Further, the fire chief testified that the properties were in a high risk fire danger zone, and that eucalyptus trees were a fire hazard.

As to the remedy, the court determined that the only way to abate the nuisance was to remove a substantial number of the trees, agreeing with Moritz that they are a fire hazard; are at risk of catastrophic failure resulting from various defects; will continue to foul respondents' property with debris; and will unpredictably drop large limbs causing damage to property or people. The court adopted Moritz's tree tally and assessment "as a reasonable and equitable way to abate the nuisance. Mr. Moritz's recommendation removes the trees which are a direct hazard to plaintiffs, but allows a number of trees to remain closer to the defendant's house, so she can continue to enjoy some of her trees." However, the court ordered respondents to share the cost of abatement equally, meaning Wolff would pay one-third, with respondents' combined shares not to exceed two-thirds of the lowest bid. The court entered judgment accordingly. This appeal followed.

II. DISCUSSION

The thrust of Wolff's appeal is that there is no substantial evidence to support the trial court's finding that her eucalyptus grove constituted a nuisance, and in any event it was an abuse of discretion to issue a permanent injunction. On a related note, she claims that the trial court employed the wrong standard to respondents' private nuisance claim, faulting it for relying on "antiquated" cases concerning physical encroachment of tree roots and limbs, when instead it was respondents' burden to prove negligence in managing the grove, which they utterly failed to do.

A. *Standard of Review*

Whether something is deemed a nuisance in a particular instance is a question of fact for the trier of fact. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1231.) We review factual findings under a substantial evidence standard. Thus we resolve all factual conflicts and credibility questions in favor of the prevailing party and indulge all reasonable inferences to support the lower court's order. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1180.) With respect to the remedy of permanent injunction, the grant or denial of such relief is within the trial court's discretion and we will not disturb its decision absent a clear showing of abuse. (*Ibid.*)

B. *Nuisance Principles*

A nuisance is anything that "is injurious to health . . . , or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) A nuisance that affects an entire community or a considerable number of persons is a public nuisance; all other nuisances are private nuisances. (*Id.*, §§ 3480, 3481.)

A private nuisance is a civil wrong rooted in a nontrespassory interference with a plaintiff's use and enjoyment of land. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937.) A plaintiff pursuing a private nuisance theory must " 'prove an injury specifically referable to the use and enjoyment of his or her land. . . . [¶] . . . "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance." ' " (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302.)

While the core feature of nuisance is the unreasonable invasion of a plaintiff's interest in property and not the particular type of conduct constituting the invasion, liability nonetheless rests on some sort of underlying tortious conduct. (*Lussier v. San Lorenzo Valley Water Dist*. (1988) 206 Cal.App.3d 92, 100 (*Lussier*).) Thus the invasion may be intentional and unreasonable, reckless, negligent, or the result of ultrahazardous activity. (*Ibid*.; Rest.2d Torts, § 822 & com. a, pp. 108-109.) Where the interference results from a natural condition on a defendant's land, as a practical matter imposition of liability under a nuisance theory "requires a finding that there was negligence in dealing with it." (*Lussier, supra*, 206 Cal.App.3d at p. 102, fn. omitted.) And, where liability for nuisance is predicated on the landowner's failure to abate the nuisance, rather than having created it, " 'then negligence is said to be involved.' " (*Id.* at p. 105.) However, the *Lussier* court acknowledged a "unique line of cases" involving encroachment of tree roots and branches—including some cited in our trial court's statement of decision—that appear to impose nuisance liability *in the absence* of wrongful conduct. It criticized these cases as lacking a rationale and failing to address the distinction between natural and

artificial conditions and the now discredited theory that immunized a landowner from liability for harm caused by natural conditions of the land. (*Id*. at p. 102, fn. 5.)

C. *Analysis*

1. Substantial, Unreasonable Interference. Wolff first asserts there was no substantial evidence that her trees caused respondents to suffer substantial harm. We disagree. Respondents testified to the terrifying noise; the continuing littering of their property with tree debris and branches; clogging of gutters; killing of plants; staining of hardscape; constant cleanup work and damage to a roof; broken window screens; and a damaged gate. Additionally, several large branches had fallen onto their property during the course of the dispute, one in the play area of the Mindels' children. There were tree failures impacting a neighbor's property, and another that lodged on a tree within the grove. Further, based on its own observations during the site visit, the court came to the conclusion that the trees presented a substantial and real hazard to respondents' homes. There was abundant evidence that Wolff's trees substantially interfered with respondents' use and enjoyment of their land.

The evidence also supports a conclusion that the interference was unreasonable—that is, " ' "of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land," ' " gauged from a reasonable person standard. (*Monks v. City of Rancho Palos Verdes*, *supra*, 167 Cal.App.4th at p. 303.) The extensive pelting and blanketing of debris and branches and the resulting interference and harm detailed above was not a one-time occurrence, but rather happened regularly, particularly after a storm. The situation had been ongoing since respondents moved to their current property and continued to the time of trial.

Wolff complains that the trial court's finding of harm rested "almost exclusively" on an "unquantified risk of future harm to respondents' safety or property." She faults Moritz's expert testimony because he targeted trees for removal based on a "sliding scale that balanced the value of the target at risk," such as a home, and the nature of the particular defect presented by the tree.

First, Wolff's characterization of Moritz's hazard assessment is misleading; as summarized above, Moritz's hazard assessment was more extensive and inclusive than she admits. Second, while uncertainty of future harm by itself is not sufficient to obtain an injunction against a nuisance, a reasonable probability of significant harm is. (*Monks v. City of Rancho Palos Verdes, supra,* 167 Cal.App.4th at p. 306.) Here, substantial evidence supports the conclusion of a reasonable probability of future harm from failing branches and fire. Several branch failures have already fallen and damaged property, another landed in the high impact area of the children's yard, and there have been whole tree failures within the Wolff grove although none have fallen on respondents' property. The grove is overmature and inhabited by numerous trees with serious defects. The species itself is prone to failure and presents a fire hazard. Moritz testified extensively on the issue of fire hazard; his testimony was not contradicted. Further, the Palm Hill area of Larkspur is designated a "High Hazard Fire Zone" and, recognizing the fire hazard presented by blue gum eucalyptus, the City of Larkspur has forbidden the species to be planted in such areas. Substantial evidence supports the conclusions that respondents have suffered past and continuing actual harm and there is a reasonable probability of future harm.

2. Wolff's Conduct. Wolff is adamant that the trial court used the wrong standard to evaluate her conduct, arguing that it was respondents' burden to establish she was negligent in managing the grove, a burden they failed to meet. We disagree.

It is true that the trial court cited early tree encroachment cases which focused on the interference with plaintiff's property. (See, e.g., *Parsons v. Luhr* (1928) 205 Cal. 193; *Stevens v. Moon* (1921) 54 Cal.App. 737.) It is also true that the trial court did not specifically mention negligence. However, the court did ultimately conclude that while Wolff did not create the nuisance, the grove in its present condition constituted a clear and continuing hazard to the well being of respondents and their properties. Moreover, the reasonableness of Wolff's efforts to manage the grove and her response to respondents' concerns were issues throughout the course of trial. Implied in the court's ultimate finding as stated above is the finding that Wolff did not abate the nuisance.

Where, as here, liability stems from the landowner's failure to abate a nuisance, negligence is implicated. (*Lussier*, *supra*, 206 Cal.App.3d at pp. 104-105.)

Wolff claims that because she followed the recommendations of arborists whom she trusted, and acted to correct the fire department's brush abatement order, there is no basis to find her actions negligent. Not so. The record is replete with substantial evidence that Wolff acted unreasonably with respect to her trees. Wolff adopted a course of picking and choosing arborists and picking and choosing what actions to take, based on her underlying resolve to keep her trees, no matter what.

Initially, Weiss had to resort to self-help to make the Way worksite safe from tree droppings. Further, over the course of several years three arborists from MCA recommended removing at least some trees. When James Lascot was an employee of the company, he advised removal and replacement of Wolff's trees due to their high maintenance needs. Louie Brunn told her all her trees must be considered hazardous, each was capable of inflicting serious injury, and pruning would reduce but not eliminate the possibility of failure. Bovero, the president of MCA, recommended severe pruning and removal of some trees. Brooks told Wolff one of her options was to remove some trees, and also related that the volume of debris rendered the neighboring properties a nuisance; he would remove the trees if they were his. As well, Brooks recommended that Wolff take up the Mindels' offer to pay to have her trees removed. Further, he thought the removal offer made sense because some of the trees had been severely topped and he was concerned about resprouting and rot at the topping cuts. Early on Brooks told Wolff that without ongoing monitoring and maintenance, she would have a hazardous situation, and removal was preferable to topping.

Wolff did not follow through on many of the recommendations. She received estimates from Lascot and Brunn, but did not authorize MCA to do the work. Bovero said he would do no further work for Wolff because his recommendations fell on deaf ears and he was concerned with safety and liability issues. Wolff hired Brooks to perform some of the recommended work, but he was not licensed, his certification lapsed, he carried no insurance and Wolff's budget limited what he could do—she would not

expand the scope of work beyond a day. He felt he was always performing a sort of "triage" due to budget restraints. Bovero testified that liability insurance, workers' compensation insurance, arborist certification and a state contractor's license are the key qualifications a client should look for in selecting a tree care company. Further, Bovero was of the opinion that the work involved on these large trees was outside the scope of what Brooks could do.

And, while Wolff herself testified that she had her trees inspected regularly, when deposed she could not say how often, by whom, or what their qualifications were. There was scant documentary evidence to support her maintenance claims—no invoices from MCA and only one from Brooks in 2006, for a tree that did not impact respondents' property.

D. *Evidentiary Rulings*

Wolff complains that the trial court repeatedly allowed respondents to submit irrelevant and prejudicial evidence and made "numerous non-evenhanded evidentiary rulings," in which it "contradicted its own reasoning to repeatedly favor the respondents and thus discriminatorily applied two sets of rules of evidence."

1. Interactions with Neighbors. Specifically, Wolff objects to evidence regarding her interactions with her neighbors, claiming it was not legally relevant to a private nuisance action. Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Wolff has argued that to prevail respondents had to prove negligence. She also claims that the injunction is overbroad. The history of Wolff's interactions with her neighbors was relevant to the issue of whether she acted reasonably with respect to maintaining the trees. And, as the trial court pointed out, Wolff's past history of maintenance and her relationship with neighbors concerning the trees was also relevant in determining the choice of equitable remedies, maintenance versus removal, and whether the remedy would require supervision and repeated court involvement.

The relevancy bar is not high, and includes issues of credibility. The trial court did not abuse its discretion in allowing a variety of evidence concerning the history of the parties' relationship, Wolff's attitude and practices with respect to her grove of trees and her neighbors' concerns.

2. Charges of Inconsistency. Wolff also challenges the rulings as inconsistent and discriminatory. For example, she maintains the court excluded evidence that Dan McKenna previously agreed with Wolff's experts that the trees could be maintained safely on grounds that the agreement was the outgrowth of a failed mediation effort, while allowing evidence of the parties' prelitigation settlement negotiation positions on removal versus maintenance.

These rulings were sound. First, Wolff does not assert that the court was incorrect in ruling that discussions between McKenna and Allen were the result of an ongoing attempt at mediation, and thus this ruling must be correct. (Code Civ. Proc., § 1775.9; Evid. Code, § 1119, subd. (b).) In contrast, the purported "settlement" negotiations in fact were not prelitigation settlement negotiations within the meaning of Evidence Code section 1152, but rather consisted of the Mindels' 2002 offer to fund tree removal and a 1998 invitation from respondents' attorney to work together to resolve concerns about the eucalyptus stand.

Further, Wolff complains that while giving free reign to respondents to probe the history of dealings between neighbors, the court did not allow her to rebut this evidence. Despite the court's musing that delving into "all [the] background" was "history" and "what we're really dealing with is what the situation is right now," the court allowed Wolff's counsel latitude to fully explore the subject.

Similarly, Wolff maintains the court allowed respondents to use deposition testimony for impeachment purposes, but told her counsel that reading deposition testimony was a colossal waste of time unless it "clearly impeaches the witness on a material fact." This was just the court's reflection on the relative value of depositions when indicating that counsel could mark the deposition as evidence. Further, the court repeated its comments about the probative value of reading deposition testimony when

respondents' counsel started walking Wolff through her deposition. And in any event, there was no objection to appellant's counsel's use of deposition testimony to impeach because counsel did not try to do so.

As well, Wolff charges that the court was inconsistent in cutting off her cross-examination as argumentative, while allowing respondents to engage in the same behavior. As a "particularly glaring" example, she says the court permitted respondents, over objection, to "impugn" Brooks by showing he did not carry insurance, but sua sponte cut off as argumentative her effort to probe whether lack of insurance had anything to do with his ability to assess hazards. To begin with, defense counsel's objection to the insurance question was based on a lack of foundation, which the witness (Bovero) established. While cross-examining Bovero, defense counsel asked the court to instruct him "*not to argue with me*." (Italics added.) Attempting humor, the court pounded its fists together and commented: "Too much alpha male here. We're not out in the forest." Defense counsel then asked, relative to Brooks's lack of insurance, whether Bovero's assessment of his abilities would change if he lacked insurance. Rejecting the answer that "it's something I wouldn't do" as not responding to what counsel asked, at that point the court ruled the questioning was argumentative. The trial court's large measure of discretion to keep cross-examination within reasonable bounds was not abused.

3. <u>"Undisclosed" Experts.</u> Wolff further protests that the court allowed "undisclosed" experts and laypersons to give opinions on the condition of the trees, while limiting her undisclosed expert. She gives the example of Weiss, who, when asked to describe the general condition of the stand of eucalyptus at the time he commenced construction, said they were in their "natural state." A description, *not* an expert opinion. She also attacks Bovero's testimony in the context of explaining recommendations he made to the Mindels for removal of some of the trees. This testimony properly went to the history, course of dealing and reasonableness of the parties' efforts with respect to the trees. Nor was it error for Lawrence Way to attest to *his experience* and *from his perspective* as to any changed conditions in the grove following a recent pruning. On the

other hand, Catherine Way did attempt to testify about the legal duties of Marin County homeowners living in high fire hazard areas. While her testimony should have been stricken, it was generally cumulative of admissible evidence on the issue.

Wolff also accuses the court of sua sponte eliciting Bovero's opinion on the ultimate issue of the case, namely whether to remove the trees. Bovero was answering questions about Louis Brunn's 2004 estimate of work, which included a disclaimer that pruning would reduce but not eliminate the possibility of tree or limb failure and MCA would not be liable in the event of such failure. The court asked Bovero if his recommendation at this time would be the same as Brunn's—to remove the trees—in other words, did he agree with his own employee's report. Even if this crossed the line to expert testimony, there was no objection and Bovero had already testified that he recommended tree removal to Wolff and the Mindels.

Although Wolff criticizes the court for not allowing Lascot to provide an expert opinion, the record is clear that the court bent over backward to allow his testimony about maintenance and his advice concerning the trees, in his capacity as "a qualified treeman, arborist, with a lot of experience." Wolff also faults the court for preventing her from rehabilitating a witness, but the record shows that the testifying witness did not know anything about the person.

4. Purported Bias. Finally, Wolff's example of circumstances demonstrating bias in favor of respondents simply is not borne out by the record. As in any trial, some rulings favored respondents, some appellant. Sometimes the court was impatient, other times it gave great leeway. We have reviewed the record and detect no animus toward Wolff. Moreover the absence of animus is evident in the statement of decision and judgment. The remedy posed a difficult question for the court. Concluding removal of some trees was the only answer, the court charged Wolff with only a third of the cost of removal.

E. *Remedy*

Our courts have broad power to fashion equitable remedies, and can create new remedies to address novel fact circumstances. But that power, of course, is not without

limits. It is always a court of equity's duty to " 'strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.' " (*Dawson v. East Side Union High School Dist*. (1994) 28 Cal.App.4th 998, 1040.) And, where injunctive relief is sought, we are mindful that the injunction is an extraordinary power, to be exercised with great caution and thus we should rarely, if ever, exercise it in a doubtful case. Thus, if, at the time of judgment, there is no reasonable probability that the complained of past acts will recur, the court should deny injunctive relief. (*Ibid.*) Because a permanent injunction is a final judgment on the merits that the plaintiff has prevailed on a cause of action, it must be sufficiently supported by the evidence. (*Id*. at p. 1041.)

Wolff attacks the injunction on three fronts: It was overly broad, contrary to the public interest, and unnecessary because there is an adequate remedy at law. We are not persuaded.

Wolff declares the court abused its discretion in ordering the removal of numerous trees based on the indiscriminate adoption of Moritz's report. She contends the court ignored the fact that Moritz's report recommended destruction of several trees that he said did not target respondents' property, and was equivocal about removal or maintenance of another. Wolff has provided no citation to the record to support this contention. Without any context whatsoever to evaluate this contention, it is waived. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

In any event, the trial court did not abuse its decision in adopting Moritz's recommendations. Moritz came with impeccable credentials and knowledge of the species and the hazards associated with it. He did a careful tree-by-tree assessment discussed in detail above, delineated the defects tree by tree and explained the hazards from fire and failure. The trial court was well within its discretion to accept his opinion that the trees are a fire hazard; are at catastrophic risk of failing from various defects; and will continue to drop branches, leaves, bark and large limbs, fouling and causing damage to respondents' property and/or people. These findings are supported by the abundant substantial evidence recited above, including the court's site visit.

On a related note, Wolff argues respondents failed to show that she could not cure the nuisance with less intrusive measures such as removing dead, dying or diseased branches or using cables to stabilize trees. There is ample evidence in the record that Wolff did not abate the nuisance with adequate maintenance, and further she does not show any evidence in the record about alternatives such as cables, let alone whether such alternatives would abate the nuisance. Additionally, a plan of strict maintenance would require court supervision and open the door for further disputes. More to the point, maintenance without any removal was not the plan that Moritz, with substantial evidence, proposed.

We also disagree with Wolff's position that the permanent injunction is against the public interest. In essence she posits that the court should have explained why the hazards posed by the trees outweighed the public's interest in their existence. Her authority[4] traces back to Restatement of Torts sections 933 and 942, concerning the factors to consider when considering issuing a permanent injunction. This is a private nuisance case between neighbors. To the extent the injunction reduces hazards from Wolff's trees, it reduces hazards for other bordering neighbors, e.g., the Lynches. Wolff does not identify any evidence in the record documenting countervailing third party or public interest concerns. Nor does she point to any such argument made below.

Finally, Wolff is wrong that there is an adequate remedy at law. The argument is that money damages would be sufficient to cover costs of raking and replanting grass. It goes without saying that this case involves much more than falling leaves and debris; respondents demonstrated a reasonable probability of future harm based on the hazard of fire and the risk of tree and limb failure and resulting damage to property and/or life.

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[4] Wolff refers us to *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 592, concerning the appropriateness of injunctive relief to prohibit defendants from knowingly employing illegal immigrants, which case in turn cites *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588, concerning homeowner efforts to enjoin certain flight operations out of a public airport. The latter case in turn references the Restatement of Torts. Both cases involved issues of public concern and hence in both cases those concerns were appropriately assessed and weighed in determining the remedy.

And even just focusing on excessive debris, respondents would need to bring multiple actions to receive full compensation. An injunction is an appropriate remedy where "restraint is necessary to prevent a multiplicity of judicial proceedings." (Code Civ. Proc., § 526, subd. (a)(6).)

III. DISPOSITION

The judgment is affirmed.

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Reardon, Acting P.J.

We concur:

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Sepulveda, J.

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Rivera, J.